IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-110414 TRIAL NO. B-1006833
Plaintiff-Appellant,	:	JUDGMENT ENTRY.
vs.	:	
DONTRAVISE HILL,	:	
Defendant-Appellee.	:	
	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 3(A); App.R. 11.1(E); Loc.R. 11.1.1.

In four assignments of error, defendant-appellant Dontravise Hill appeals the decision of the trial court convicting him of one count of felony murder, with the predicate offense being felonious assault. We affirm.

Michael Berry and Theresa Hill, Hill's mother, got into an argument at an area bar. Berry and Ms. Hill often engaged in such arguments at this establishment. Berry was told to leave the bar, and Ms. Hill called Hill and asked him to come down. Ms. Hill then left the bar, at which time the argument with Berry resumed. The encounter had become physical by the time that Hill arrived at the scene. Hill was seen with a large knife when he arrived. Hill joined the struggle, which occurred behind a van—partially obstructing the view of witnesses. Berry was stabbed several times and died as a result of his injuries.

In his first assignment of error, Hill complains that his conviction was based upon insufficient evidence and was against the manifest weight of the evidence. The standards for determining whether a conviction was based upon insufficient evidence or was against the manifest weight of the evidence are well established. When an appellant challenges the

sufficiency of the evidence, we must determine whether the state presented adequate evidence on each element of the offense. *See State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). On the other hand, when reviewing whether a judgment was against the manifest weight of the evidence, we must determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding the defendant guilty. *Id.* at 387.

As the state notes, multiple witnesses saw Hill run up Race Street with a knife in his hand, and some saw him making a stabbing motion while engaged in the fight with Berry. Some of the witnesses also saw that Hill still had the knife in his hand when he walked away. Based on the testimony presented at trial, we cannot say that the evidence of murder was inadequate or that the jury lost its way when it concluded that Hill committed that offense. Hill's first assignment of error is overruled.

In his second assignment of error, Hill claims that the trial court improperly refused to instruct the jury on the charge of involuntary manslaughter. Since Hill also raises the refusal to instruct on voluntary manslaughter, self-defense, and defense of others, we will address those arguments as well.

Voluntary manslaughter as defined in R.C. 2903.03(A) requires a showing that the defendant acted "under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force." Here, the evidence demonstrated that Hill had been called to the scene by his mother before the fight began. Upon arriving, he saw his mother and Berry in a scuffle. This was not sufficiently serious provocation to warrant an instruction on voluntary manslaughter.

Involuntary manslaughter is a lesser-included offense of felony murder. *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185. Involuntary manslaughter

as defined in R.C. 2903.04(A) requires a showing that the death was the proximate result of the commission of a felony. The felony-murder statute requires a showing that the death was the proximate result of the commission of "an offense of violence that is a felony of the first or second degree." There was no other felony that Hill committed, other than felonious assault that proximately caused the death of Berry. Therefore, an instruction on involuntary manslaughter was not appropriate. *See State v. Berry*, 1st Dist. No. C-030632, 2004-Ohio-6436, ¶ 12 (involuntary manslaughter instruction not warranted when the only possible underlying felony was felonious assault).

Finally, instructions on self-defense and defense of another would also have been improper. In order to use deadly force, Hill would have to have shown that he reasonably believed that he or his mother was in imminent danger of death or great bodily harm and that the *only* means of escape from the danger was the use of force. *State v. Juntunen*, 10th Dist. Nos. No. 09AP-1108 and 09AP-1109, 2010-Ohio-5625, citing *State v. Griffin*, 2d Dist. No. 20681, 2005-Ohio-3698, ¶ 18. When Hill arrived, his mother and Berry were engaged in a scuffle, into which he immediately inserted himself. Under the facts in this case, Hill was not entitled to these instructions. We overrule his second assignment of error.

In his third assignment of error, Hill claims that the state improperly failed to disclose the identity of witnesses in the case. Crim.R. 16 requires the disclosure of this information, unless the state can show that the disclosure will compromise the safety of a witness, victim, or third party. The decision to order disclosure is left to the sound discretion of the trial court. *See State v. Trollinger*, 1st Dist. No. C-110340, 2012 Ohio App. LEXIS 2113 (May 30, 2012). In this case, the state presented evidence that this was a neighborhood where all of the parties and witnesses knew one another. All of the main witnesses were regular patrons of the bar where the fight between Berry and Ms. Hill

began. Additionally, the trial court was presented with evidence that threats had been made against "everyone who would testify" against Hill. Under these circumstances, the trial court did not abuse its discretion. Hill's third assignment of error is overruled.

In his final assignment of error, Hill claims that trial counsel was ineffective. Hill first claims that counsel was ineffective for not objecting to testimony about what Ms. Hill said on the phone when she called Hill to get him to come to the bar. But the call, similar to 911 calls, would have been admissible as an excited utterance under Evid.R. 803(2) as Ms. Hill was still in a state of anger when she made the statement "I'm going to get my son." It also would have been admissible as a statement of her "then existing state of mind * * * (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" under Evid.R.803(4). *See State v. Byrd*, 1st Dist. No. C-050490, 2007 Ohio-3787, ¶ 31 (statements of current intent to take future actions are admissible for the inference that the intended act was performed). And, the statement—shouted in a bar after an argument—was not "testimonial" within the meaning of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Hill also argues that he was denied the effective assistance of counsel because the attorney-client relationship had broken down. A review of the transcript, however, shows that this is not the case. While counsel may not have pursued every avenue of inquiry Hill would have liked, the record does not demonstrate "a complete breakdown in communication." *State v. Swogger*, 5th Dist. No. 2011-CA-007, 2011-Ohio-5607, ¶ 13. And, in fact, while Hill complained about counsel not listening to his suggestions, he never asked for a new attorney. Therefore, we overrule Hill's fourth assignment of error.

Having considered all assignments of error, we affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and **FISCHER, JJ.**

To the clerk:

Enter upon the journal of the court on June 29, 2012

per order of the court _____.
Presiding Judge